No. 6537

United States Circuit Court of Appeals

For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Supplemental Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

WELLINGTON D. RANKIN,
United States Attorney.
ARTHUR P. ACHER,
Assistant U. S. Attorney.
SAM D. GOZA, Jr.,
Assistant U. S. Attorney.
Attorneys for Appellant.

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CASES CITED

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Attorneys for Appellant.

ARGUMENT

The question is presented as to the authority of this Court to review this case on the record as filed. A petition for writ of certiorari for diminution of the record has been filed. For the convenience of the court the petition is printed and made a part of this brief (pages 10-12).

It will be noted that in the transcript of record in this case, it appears that at the conclusion of the plaintiff's case in the court below the following proceedings were had:

> "Thereupon, the defendant moved for judgment in its favor and against the plaintiff upon the ground that the evidence was insufficient to support judgment for the plaintiff, motion denied by the Court and exception of the defendant noted." (Tr. 49.)

By the petition for writ of certiorari for diminution of the record we have asked that the transcript be supplemented by the addition of the minutes of the Court showing the record at the trial of this cause so that the record may be amended to show that the foregoing motion was in fact made at the conclusion of all of the evidence in the case. From the Clerk's records it will be noted that a stipulation waiving trial by jury having been filed:

> "Thereupon, J. E. O'Connell and Hugh D. Galusha were sworn and examined as witnesses for plaintiff, and certain documentary evidence

was introduced, whereupon plaintiff rested. Thereupon A. B. Atwater was sworn and examined as a witness for defendant, and certain documentary evidence was introduced, whereupon defendant rested. Thereupon J. E. O'Connell was recalled in rebuttal and certain documentary evidence was introduced, whereupon plaintiff rested and the evidence closed. *Thereupon defendant moved the court to order judgment entered herein in his favor and against the plaintiff, which motion was resisted by the plaintiff, whereupon, court ordered that said motion be denied, the exception of defendant to the ruling of the court being duly noted.*" (Italics ours) (This brief, page 14).

Counsel for the appellee have consented to the amendment of the record to show that the motion was made at the conclusion of all of the evidence in the case, to the end that the record on appeal may conform to the truth (this brief page 18).

THE MOTION RAISED A QUESTION OF LAW FOR REVIEW AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A JUDGMENT.

This motion for judgment which corresponded to a motion for a directed verdict presented a question of law as to whether the evidence was sufficient in law to sustain a judgment which is subject to review. Thus

in the case of *Maryland Casualty Co. v. Jones,* 279 U. S. 792, 795, the Court said:

> "Here the rulings of the court to which the defendant excepted and as to which it assigned errors, plainly related to matters of law. The motion for nonsuit—which corresponded to a motion for a directed verdict—presented the question whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment. See Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 38."

In the case of *Zurich General Acc. & L. Ins. Co. v. Mid-Continent P. Corp.* (C. C. A. 10) 43 F. (2d) 355;

> "Section 773 provides that a finding of the court upon the facts in a cause tried without a jury shall have the same effect as the verdict of a jury. Section 879 forbids a reversal on a writ of error for any error of fact. But questions of law are open to review, and it was a question of law whether there was substantial evidence to uphold the finding of the trial court. It was needful for the appellant to request or move for a declaration of law, or take an equivalent step in the trial court. Wear v. Imperial Window Glass Co. (C. C. A.) 224 F. 60. But the plaintiff moved for a judgment upon the evidence, the motion was denied, and an exception was reserved. And that motion raised a question of law for review as to the sufficiency of the evidence. Maryland Casualty Co. v. Jones, 279 U. S. 792, 49 S. Ct. 484, 73 L. Ed. 960; United States Fidelity & Guaranty Co. v. Board of Commissioners (C. C. A.) 145 F.

144; Pennok Oil Co. v. Roxana Petroleum Co. (C. C. A.) 289 F. 416."

Also see *People's Bank v. International Finance Corporation,* (C. C. A. 4) 30 F. (2d) 46; *Grainger Bros. Co. v. G. Amsinck & Co.* (C. C. A. 8) 15 F. (2d) 329, *First Nat'l Bank of San Rafael v. Philippine Refining Corp.,* (C. C. A. 9) 51 F. (2d) 218.

THE SUFFICIENCY OF THE FACTS FOUND TO SUPPORT THE JUDGMENT MAY BE REVIEWED BY THIS COURT.

Section 875, Title 28 U. S. Codes provides:

> "When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Under this section if the trial court has made special findings the question of law of whether or not such findings support the judgment is subject to review,

even without a bill of exceptions, *Tyre & Spring Works Co. v. Spalding,* 116 U. S. 541; *Jennisons v. Leonard,* 21 Wall 302, 307.

The district court has made an order nunc pro tunc as of February 5, 1931, designating and entitling its opinion as its special finding (this brief page 16). This court has held that the court may adopt its opinion as its findings of fact and conclusions of law and that the opinion thereupon becomes a part of the record, *Clara B. Parker, et al. v. A. F. St. Sure,* (C. C. A. 9) 53 F. (2d) 706, 709. In that case this court said:

> "In these cases the district judge filed an opinion and adopted the same as his findings of fact and conclusions of law. We see no objection to this course. Until the opinion is adopted by the court as its findings of fact and conclusions of law, it is not a part of the record."

It is submitted that the district court had authority to make the order nunc pro tunc as of February 5, 1931, designating its decision as its special findings. The order does not purport to allow an exception where one was in fact not taken but is a correction of the record in strict accordance with the truth. The application for the order was made upon the authority of the case of *Insurance Co. v. Boon,* 95 U. S. 117, 126. In that case the court ordered special findings to be signed and filed nunc pro tunc conformably to the opinion theretofore filed. The Court said:

"Generally, it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; *but every court of record has power to amend its record, so as to make them conform to and exhibit the truth.* Ordinarily there must be something to amend by; but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was. Within these rules, we think, was the order made at September Term, that the special finding of facts and conclusions of law be signed by the judges and allowed, conformably to the opinion of the court theretofore filed, and that it, together with the order, should be filed nunc pro tunc as of April Term, and made part of the record. It was but an amendment or correction of form, the form of the finding, not of its substance, and there was enough to amend by. The opinion, which was filed concurrently with the entry of the judgment, contained substantially, almost literally, the same statement of facts, and relied upon it as the foundation of the judgment given. True, that opinion is no part of the record, any more than are a judge's minutes; but it was a guide to the amendment made, and it seems altogether probable it was intended to be itself a special finding of the facts. *The order of September, 1874 recites that the court had at April Term filed, announced, and declared their findings of facts, with their conclusions of law thereupon, which findings and conclusions were embodied in the opinion of the court announced and filed in the case. All that was wanting to make it a sufficient special finding was that it was not entitled "finding of facts."* The amendment or correction, therefore, contradicts nothing in the record as made at April

> Term, and it is in strict accordance with the truth. We conclude, then, that the order of September Term was within the discretion of the court, and that by it the special findings returned became a part of the record of the cause, *and that the judgment founded upon it is subject to review in this court without any bill of exceptions.*" (Italics ours.)

This court in speaking of the above case said in *First Nat. Bank of San Rafeal v. Philippine Refining Corp.* (C. C. A. 9) 51 F. (2d) 218, 222:

> "In Insurance Co. v. Boon, 95 U. S. 117, 126, 24 L. Ed. 395, the Supreme Court had occasion to consider the right of a Circuit Court at a subsequent term to make findings of fact and conclusions of law to be filed nunc pro tunc as of the previous term. It was held that, where the trial court in the previous term had filed an opinion of the court, and where the finding was but an amendment or correction in form of the finding contained in the opinion and was not of its substance, there is enough to amend by."

It is conceded that the objection could perhaps be raised that notwithstanding the fact that the District Court has authority to make an order nunc pro tunc, denominating its decision as its special findings, it would not have authority in this case without leave of the appellate court, although it is submitted that being nunc pro tunc it would relate back to the date when it should have been made, 42 C. J. 532. If the court is of the opinion that such an order could properly be

made, but not after an appeal is perfected, we respectfully request that the Circuit Court remand the cause to the District Court with permission to make such an order and a new application therefore will be made, *United States v. Adams,* 6 Wall. 101.

CONCLUSION

The petition for Writ of Certiorari is prayed for to correct the record and show that a motion for judgment was made by defendant and appellant at the close of all the evidence, and the appellee has consented to the granting of such petition. Being so corrected the court may consider the sufficiency of the evidence to support the judgment.

A petition for Writ of Certiorari or other appropriate writ is also prayed for to include the order of the district court designating its decision as special findings, or permitting the district court to make such an order, whereupon the circuit court may consider the sufficiency of the findings of the trial court to support the judgment.

Respectfully submitted,

WELLINGTON D. RANKIN,
United States Attorney.
ARTHUR P. ACHER,
Assistant U. S. Attorney.
SAM D. GOZA, Jr.,
Assistant U. S. Attorney.
Attorneys for Appellant.

No. 6537

(TITLE OF COURT AND CAUSE)

PETITION FOR WRIT OF CERTIORARI FOR DIMINUTION OF RECORD

Comes now the appellant and respectfully represents:

1. That in the oral argument of the above entitled cause before the above entitled Court on January 5, 1932, the question was raised as to the power of the Court to consider the sufficiency of the evidence to support the judgment by reason of the absence of a motion for judgment in its favor by defendant and appellant in the trial court at the close of all the evidence and the question of the authority of the Court to consider the sufficiency of the facts found to support the judgment for want of special findings.

2. That these questions were raised for the first time at the time of oral argument.

3. That from an examination of the record of the Clerk of the United States District Court wherein the case was tried, it appears in the minutes of the Court with respect to the trial of the case that a motion by the defendant and appellant for judgment upon the ground that the evidence was insufficient to support a judgment for the plaintiff and appellee was duly

made, denied and an exception noted at the conclusion of all of the testimony and not at the close of the plaintiff's case as stated in the transcript of record herein.

4. That this defect in the record on appeal was not noted until at the time of the oral argument herein.

5. That said motion is incorporated in the Bill of Exceptions herein, but through inadvertance appears at the end of plaintiff's case, whereas in truth and in fact it should appear at the conclusion of all of the evidence in the case.

6. That the plaintiff and appellee in the judgment entered herein has treated the the Decision of the Court as its special findings, and they were so considered by appellant and the trial Court; that the District Court has entered in said Court an order nunc pro tunc as of February 5, 1931, to the effect that its opinion was adopted as its findings of fact and conclusions of law herein;

7. That annexed hereto are respectively a certified copy of the minute entry of the proceedings at the trial of this cause in the District Court; the stipulation waiving notice and the order filed in the District Court on January 26, 1932, hereinbefore mentioned.

8. That to the end that the record on appeal may conform to the truth these corrections in form should be made.

WHEREFORE, petitioner prays:

(1.) That a Writ of Certiorari or other appropriate writ be granted by this Court for a diminution of the record in this cause to include the Minutes of the District Court showing the proceedings at the trial of this cause and that a motion for Judgment in favor of the defendant and appellant was made at the conclusion of the trial, that said motion was denied and an exception noted, and that the bill of exceptions and transcript of record be corrected accordingly;

(2.) That a Writ of Certiorari or other appropriate writ be granted by this Court to include the order of the District Court designating its written opinion as its special findings, or if the Court is of the opinion that the District Court is without jurisdiction to make such order that the case be remanded to said District Court with permission to make such order.

C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana,

Appellant.

WELLINGTON D. RANKIN,
United States Attorney.

SAM D. GOZA, Jr.,

ARTHUR P. ACHER,
Assistant U. S. Attorneys.

Attorneys for Appellant.

United States of America, District of Montana—ss.

Arthur P. Acher, being first duly sworn, deposes and says:

That he is one of the attorneys for the Appellant, C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana in the foregoing cause, that he has read the foregoing petition and knows the contents thereof and the matters and things therein stated are true of his own knowledge.

ARTHUR P. ACHER,

Subscribed and sworn to before me this 26th day of January, 1932.

MARJORIE McLEOD,

Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires March 31st, 1934.

In the
District Court of the United States
District of Montana

No. 1399, Eddy Steam Bakery vs. C. A. Rasmusson, Collector.

This cause came on regularly for trial this day, Mr. T. B. Weir appearing for the plaintiff, and Mr. W. D. Rankin, U. S. Attorney, and Mr. A. P. Acher, Assistant U. S. Attorney, appearing for defendant. Thereupon, on motion of Mr. Rankin, court ordered that Mr. John R. Wheeler, General Counsel Bureau of Internal Revenue, be admitted to practice for the purposes of this case and his name entered as associate counsel for defendant. Thereupon, a stipulation waiving trial by jury was duly filed herein. Thereupon J. E. O'Connell and Hugh D. Galusha were sworn and examined as witnesses for plaintiff, and certain documentary evidence was introduced, whereupon plaintiff rested. Thereupon A. B. Atwater was sworn and examined as a witness for defendant, and certain documentary evidence was introduced, whereupon defendant rested. Thereupon J. E. O'Connell was recalled in rebuttal and certain documentary evidence was introduced, whereupon plaintiff rested and the evidence closed. Thereupon defendant moved the court to order judgment entered herein in his favor and against the plaintiff, which motion was resisted by the plaintiff, whereupon, court ordered that said motion be denied, the exception of defendant to the ruling of the court being duly noted. Thereupon, the cause was submitted to the court and taken under advisement, each side being granted five days for briefs.

Entered in open court July 16, 1930.

C. R. GARLOW, *Clerk.*

United States District Court
For the District of Montana,
Helena Division

EDDY'S STEAM BAKERY, INC., a Corporation,
Plaintiff,

vs.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,
Defendant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, acting by and through their respective counsel, that the matter of the amendment of the record to denominate and entitle the Court's decision entered herein on February 5, 1931, its Special Findings of Fact and Conclusions of Law may be submitted to the Court without further notice.

Dated this 25th day of January, 1932.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.
WELLINGTON D. RANKIN,
United States Attorney.
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Defendant.

Filed January 26, 1932.

United States District Court
For the District of Montana,
Helena Division

EDDY'S STEAM BAKERY, INC., a Corporation,
Plaintiff,

vs.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,
Defendant.

ORDER

On February 5, 1931, the District Court of the United States for the District of Montana, in the above-entitled cause announced and declared its findings of fact and conclusions of law, which said findings of fact and conclusions of law were embodied in the opinion of the court filed on said date designed and intended by said District Court as its special findings of fact and conclusions of law although not so entitled.

NOW, THEREFORE, the parties hereto having stipulated that this matter may be submitted without further notice, upon application of the defendant and appellant, it is ordered that the decision entered herein on the 5th day of February, 1931, be and the same is hereby adopted by the court as its Special Findings of Fact and Conclusions of Law, that it be so entitled and considered, and that this order be entered nunc pro tunc as of date February 5, 1931.

BOURQUIN, *Judge.*

Filed January 26, 1932.

CLERK'S CERTIFICATE

United States of America, District of Montana—ss.

I, C. R. GARLOW, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original minute entry of proceedings at trial on July 16, 1930, stipulation and order filed January 26, 1932, in case No. 1399, Eddy Steam Bakery, Inc., a corporation, Plaintiff vs. C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, defendant now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Helena, Montana, this 26th day of January, A. D. 1932.

SEAL. C. R. GARLOW, Clerk.

By G. DEAN KRANICH, Deputy Clerk.

ACCEPTANCE OF SERVICE

Due personal service of the foregoing petition for Writ of Certiorari for Diminution of the record admitted and receipt of copy acknowledged this 27th day of January, 1932.

The appellee Eddy's Steam Bakery, Inc., hereby consents to the granting of said petition for Writ of Certiorari to supplement the transcript of record to show that a motion for Judgment in favor of the defendant and appellant was made at the close of all of the evidence in the case rather than at the close of Plaintiff's case, and consents to the submission of the petition in its other aspects on briefs to be filed without oral argument.

Dated this 27th day of January, 1932.

T. B. WEIR,
HARRY P. BENNETT,

Attorneys for Appellee.